IN THE HIGH COURT OF JUDICATURE AT PATNA
CR. WJC No.270 of 2007
SHOBHA DEVI & ANR
Versus
THE STATE OF BIHAR & ORS

O r d e r

8 14.8.2008 In the instant writ petition, the petitioners pray for quashing the order dated 28.3.2007, as contained in Annexure-7, passed by the Chief Judicial Magistrate, Saran, at Chapra, in Marhaura P.S.Case No.148 of 2004 under section 302/34 of the Penal Code by which cognizance of offence has been taken and warrant as well as process under sections 82 and 83 Cr.P.C. was issued simultaneously against Vijay Kumar Singh, husband of petitioner no.1 as well as against petitioner no.2 and another.

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The informant Shail Kumari Devi has filed a case on 10.8.2004 under section 302/34 of the Penal Code against the aforesaid accused persons for committing murder of her husband.

The petitioners submits that earlier on 27.8.2004 on the prayer of the police, the learned Magistrate by order dated 27.8.2004, as contained in Annexure-3, attached the alleged property of the husband of petitioner no.1 and

petitioner no.2 under section 83 Cr.P.C. He further submits that the aforesaid order was not permissible in law, in view of the decision of the Hon'ble Apex Court in the case of State Vs Daud Ibrahim, 1997 SC 2494, as well as a decision of this court in the case of Krishna Murari Yadav Vs State of Bihar, 2005(3) P.L.J.R.746. He submits that a warrant of arrest could not be issued to arrest a person in aid of investigation without there being sufficient material against him. Further an order of attachment under section 83 Cr.P.C. can be made only after issuance of proclamation under section 82 Cr.P.C.

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He submits that in the instant case arrest of the accused persons was stayed by superior police officials. He further submits that subsequently the case was handed over to the C.I.D. on 17.1.2005 which after investigation submitted final form charge sheeting the accused. According to him charge sheet can be submitted only by a police officer of the Police Station in which a case is registered, unless special statute specially provides otherwise.

The grievance of petitioners is that the learned Magistrate by impugned order dated 28.3.2007, not only took cognizance of offence under section 302/34 of the Penal Code and summoned the accused persons to face trial, but by the same stroke of pen, issued warrant, as well as process both under sections 82 and 83 Cr.P.C., which is untenable in the eyes of law.

Learned counsel for the State submits that the accused persons should surrender in the court below, pursuant to the warrant and face trial. He submits that the accused persons including the husband of petitioner no.1, and petitioner no.2, have been declared absconder..

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The issue that arises for consideration before this court is whether it is lawful for a Magistrate to issue warrant, order of proclamation under section 82 Cr.P.C., as well as an order of attachment under section 83 Cr.P.C. by a composite order. Chapter VI, part B, deals with issuance of warrant of arrest. It is issued for arrest of any escaped convict, proclaimed offender, or against any person who is accused of a non-bailable offence and is evading arrest.

Section 82 Cr.P.C. provides that when any court has reason to believe that any person against whom a warrant has been issued by it has absconded or is concealing himself, so that such warrant cannot be executed, the court may publish a written proclamation requiring him to appear at a specific place and at a specified time not less than thirty days from the date of publishing such proclamation.

Section 83 Cr.P.C. provides for attachment of property of person absconding. It may be useful to reproduce section 83(1) for easy reference:

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83(1) The Court issuing a proclamation under section 82 may, for reasons to be recorded in writing, at any time after the issue of the proclamation, order the attachment of any property, movable or immovable, or both, belonging to the proclaimed person:

Provided that where at the time of the issue of the proclamation the Court is satisfied, by affidavit or otherwise, that the person in relation to whom the proclamation is to be issued-

(a) is about to dispose of the whole or any part of his

property, or

(b) is about to remove the whole or any part of his property from the local jurisdiction of the Court.

It may order the attachment simultaneously with the issue of the proclamation.

It would appear from careful reading of aforesaid two provisions that resort to section 83 Cr.P.C. could be taken only after issuance of proclamation under section 82 Cr.P.C. Such proclamation would necessarily have to remain in publication for 30 days. Only if the accused does not appear even after the elapse of the period of 30 days the Magistrate can proceed under section 83 Cr.P.C. The procedure referred to above, would address the general situation. However, in exceptional circumstances, the court would be at liberty to depart from the general rule. The proviso to sub section (1) of section 83 provides that where the court is satisfied by affidavit or otherwise, that the person in relation to whom proclamation was issued, is about to dispose of any part of his property or is about to remove the same from the local jurisdiction of the court, it may

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pass order of attachment simultaneously with the order of proclamation under section 82 Cr.P.C.

Therefore, a composite order under sections 82 and 83 Cr.P.C. can only be passed if either of the conditions mentioned in proviso (a) and (b) of section 83(1) are fulfilled. The conditions are mandatory in nature and it can be exercised only if the aforesaid requirement mentioned in clause (a) or (b) to the proviso of sub section (1) of section 83 is fulfilled.

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While passing a composite order under sections 82 and 83 Cr.P.C., the Magistrate must record its satisfaction in the aforesaid terms.

The impugned order dated 28.3.2007, does not mention whether the conditions necessary for passing a composite order as provided in proviso to sub-section(1) to section 83 Cr.P.C. existed for passing any such order under sections 82 and 83 Cr. P.C., by one go of the pen.

Thus, this court finds that the impugned order dated 28.3.2007 passed by the Chief Judicial Magistrate, Saran in Marhaura

P.S. Case No.148 of 2004, is in breach of proviso to section 83(1) Cr. P.C. and is accordingly quashed. Nonetheless, as the final form has been submitted against the husband of petitioner no.1 and petitioner no.2, they must appear in the court below without any undue delay. It would be open to the Magistrate to proceed against them in accordance with law.

In the result, this application is allowed to the extent indicated above.

(S.P.Singh,J)

KHAN

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